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# Antitrust Grand Jury Procedure

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## *Antitrust Grand Jury Procedure* *Carl Steinhouse\**

THE WATERGATE TRAUMA AND THE KENT STATE SHOOTINGS have made the public more aware of the federal grand jury's function as an investigative tool in addition to that of an accusatory body. The Antitrust Division has always used the grand jury to investigate suspected criminal antitrust activity. In most suspected crimes outside the antitrust area, the prosecutor has already marshaled the evidence and does not expect to make any significant use of the grand jury's investigative compulsory process but rather, simply asks that they return an indictment. However, since most criminal antitrust investigations involve suspected conspiratorial conduct under Section 1 of the Sherman Act,<sup>1</sup> which is, by its very nature, secretive, the Antitrust Division attorney rarely presents the grand jury with a complete case.

The typical grand jury antitrust investigation is a laborious process which takes from a minimum of six months to as much as several years to complete. Accordingly, it is an expensive and time-consuming process not only to the grand jurors and the government, but also to corporations and other persons under investigation, and the courts. For this reason, antitrust grand jury investigations are not lightly undertaken, and they require specific authorization by the Assistant Attorney General. The process from the inception of the investigation through the return of an indictment is somewhat involved and, in many aspects, unique to antitrust. Thus, it is important for an attorney whose client may be called to testify (either as one under active criminal antitrust investigation or as a witness) to understand the procedures of its various phases and the methods available for either demonstrating the client's story of purity and innocence or protecting the client's rights, as the case may be.

This article will outline the basic antitrust grand jury procedures from the inception of an investigation to the return of an indictment or no bill by the grand jury.

### **Inception of Grand Jury Investigation — Letters of Authority**

Most often, an antitrust criminal investigation originates with the receipt of a complaint from either the victim of a suspected conspiracy, or a disaffected conspirator. The Antitrust Division may also undertake investigations upon its own initiative where there has been suspicious activity, *e.g.*, simultaneous announcements of price

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<sup>1</sup> 15 U.S.C. §1 (1973) provides in relevant part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal. . . ."

increases by several competitors in an industry. In recent years the Division has conducted spot analyses of price patterns of various product lines in specific industries in different areas of the country.

Unless the complainant has some fairly convincing evidence of an antitrust conspiracy, the Antitrust Division will generally conduct a preliminary investigation into the industry to seek some substantiation of the complaint. Thus, it is entirely possible that a company or individual will be warned of the impending investigation prior to the institution of formal grand jury proceedings.

The government's attorneys must submit a factual memorandum detailing the complaint, and its subsequent investigation and verification in order to convince their superiors and, ultimately, the Assistant Attorney General that a grand jury investigation is warranted. The staff memorandum should set forth the suspected violations, the people and industries involved, the existence of jurisdictional facts (interstate commerce) and a summary of the conspiratorial facts obtained to date to justify the request for grand jury authorization. This memorandum will work its way up from the Chief of the office or section, to the Director of Operations and eventually to the Assistant Attorney General in charge of the Antitrust Division. If the Assistant Attorney General agrees with the recommendation to utilize the grand jury, he will prepare, or have prepared, his own memorandum for the Attorney General summarizing the material presented in the staff's factual memorandum and the reasons why the grand jury process should be used in this particular matter. If the Attorney General approves he will authorize the Assistant Attorney General to issue Letters of Authority addressed to each staff attorney involved in the investigation. The Letter of Authority retains and appoints that staff attorney, under the authority of the Department of Justice, to examine suspected violations of the antitrust laws by persons and businesses engaged in certain specified industries. That Letter of Authority, together with the staff attorney's sworn oath of office, is filed with the Clerk in the district where the grand jury investigation is to be conducted.

A Letter of Authority is a vital prerequisite to the investigating attorney; without it he is not authorized to attend the grand jury sessions.<sup>2</sup> Violation of the Rule against the presence of unauthorized persons in the grand jury room during its sessions will usually be sufficient grounds for dismissal of any indictment resulting therefrom, without the necessity of showing prejudice.<sup>3</sup>

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<sup>2</sup> FED. R. CRIM. P. 6(d).

<sup>3</sup> *United States v. Borys*, 169 F. Supp. 366 (D. Alas. 1959); *United States v. Carper*, 116 F. Supp. 817 (D.D.C. 1953); *United States v. Heinze*, 177 F. 770 (C.C.S.D.N.Y. 1910); *cf. In re Grand Jury Proceeding*, 309 F.2d 440 (3d Cir. 1962). *See also* *United States v. Rath*, 406 F.2d 757 (6th Cir.) *cert. denied*, 394 U.S. 928 (1969), in which an unintentional technical violation was not sufficient grounds to quash an indictment.

The Letters of Authority, if discoverable, will reveal (1) whether an attorney is authorized to conduct the investigation and (2) which industry is under investigation. Whether private attorneys can obtain access to the Letters of Authority depends on whether the Letters of Authority are automatically kept secret or are treated as a matter of public record by the district court. The policy of a particular district court can be ascertained by addressing an inquiry to the Clerk of that court.

Failure to file valid Letters of Authority prior to appearing before the grand jury will not be grounds for dismissal of an indictment if the letters are properly authorized, executed and issued to the government attorneys prior to appearance.<sup>4</sup> A change in Assistant Attorneys General will not effect the validity of a Letter of Authority issued by the former Assistant Attorney General.<sup>5</sup>

### Convening a Grand Jury

In many districts the courts prefer to impanel a separate grand jury to consider antitrust violations. The primary reason for this is because the antitrust grand juries meet over a longer and more sustained period than other grand juries. When such a grand jury is sitting, on occasion it may be utilized to investigate or return indictments regarding non-antitrust crimes.

When the court feels that the public interest requires that a grand jury be convened then such a jury will be impaneled.<sup>6</sup> The grand jury shall consist of not less than sixteen nor more than twenty-three members.<sup>7</sup> The court will usually advise the antitrust grand jury of the demands that will be made upon it. The primary demand upon the individual jurors is often the time involved. Grand juries often meet one week a month for the tenure of the jury. The grand jury can remain active for as long as eighteen months.<sup>8</sup>

At the impaneling, the court has the power to exclude a potential grand juror on the basis of a conflict of interest such as involvement in the company or industry under investigation. The court may also exclude persons from the jury if the district judge finds "that

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<sup>4</sup> *Belt v. United States*, 73 F.2d 888, 889 (5th Cir. 1934); *May v. United States*, 236 F. 495, 500 (8th Cir. 1916); *United States v. Morton Salt Co.*, 216 F. Supp. 250, 256 (D. Minn. 1962), *aff'd*, 382 U.S. 44 (1965).

<sup>5</sup> *United States v. Morton Salt Co.*, 216 F. Supp. 250, 255-56 (D. Minn. 1962), *aff'd*, 382 U.S. 44 (1965).

<sup>6</sup> FED. R. CRIM. P. 6(a).

<sup>7</sup> *Id.*

<sup>8</sup> 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §112 (2d ed. 1973).

such jury service would entail hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice."<sup>9</sup> Jurors may also be challenged by counsel on the ground that the grand jury was not selected in accordance with the law.<sup>10</sup> Also, if a juror is not legally qualified, counsel may object and remove the juror from service on the grand jury.<sup>11</sup>

After impanelment, the court will administer the oath to the grand jury as a whole and appoint a foreman and deputy foreman for that jury.<sup>12</sup> The court will then instruct the grand jurors as to the general mechanics of grand jury service, their duties and obligations<sup>13</sup> and will advise them on the rule of secrecy.<sup>14</sup> Generally, the court does not touch upon substantive law, although it may indicate that they will be concentrating primarily upon suspected violations of the Sherman Act.

At the first meeting of the grand jury, the government attorneys will hold a get-acquainted session to explain who they are, their duties, the duties of the grand jurors and what grand jury will be doing. The government attorneys will describe in a general fashion the nature of the investigation to be undertaken, the types of violations which are suspected, and the laws which may be violated. The hours of the day the grand jury will meet, procedures for examining witnesses, and other housekeeping operations necessary to the smooth functioning of the sessions will be decided.

The grand jury consists of 23 grand jurors, 16 of whom must be present to constitute a quorum.<sup>15</sup> The foreman of the grand jury generally acts as chairman during the grand jury sessions and administers the oath to the witnesses.<sup>16</sup> He is also the spokesman for the grand jury, whenever reports are made to the court. As a matter of practice, the grand jurors usually select one of their members to act as a secretary to keep a record of the jurors' attendance, the matters presented, the identity of the witnesses called and the number of votes cast on each indictment.<sup>17</sup> A question is sometimes raised by

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<sup>9</sup> 28 U.S.C.A. §1863(b) (1968).

<sup>10</sup> FED. R. CRIM. P. 6(b)(1).

<sup>11</sup> *Id.*

<sup>12</sup> HANDBOOK FOR FEDERAL GRAND JURORS, 9. [copy available at Cleve. St. L. Rev. offices]

<sup>13</sup> For example, the court will ordinarily charge the jury that in order to indict it needn't find guilt beyond a reasonable doubt but merely that there is probable cause to believe that a crime has been committed and that a particular individual or business entity has committed it. 8 J. MOORE, FEDERAL PRACTICE ¶ 6.02[2][b] (2d ed. 1973).

<sup>14</sup> HANDBOOK FOR FEDERAL GRAND JURORS, *supra* note 12, at 13-14.

<sup>15</sup> FED. R. CRIM. P. 6(a).

<sup>16</sup> HANDBOOK FOR FEDERAL GRAND JURORS, *supra* note 12, at 9, 11.

<sup>17</sup> See 8 J. MOORE, *supra* note 13, ¶ 6.02[2].

defense counsel as to the effect of absenteeism upon the ability of the grand jurors to vote an indictment, the contention generally being that absentee grand jurors have failed to consider sufficient evidence to qualify them to vote. This form of attack on the indictment has been consistently rejected by the courts.<sup>18</sup> In *United States ex rel. McCann v. Thompson*,<sup>19</sup> for example, Judge Learned Hand reasoned that "[s]ince all the evidence adduced before a Grand Jury . . . is aimed at proving guilt, the absence of some jurors during some part of the hearings will ordinarily merely weaken the prosecution's case. If what the absentees actually hear is enough to satisfy them, there would seem to be no reason why they should not vote."<sup>20</sup>

### Scope of a Grand Jury's Power

The power of any federal grand jury is very broad and has been liberally construed by the courts. A collateral attack upon this power by a person under investigation, or by witness, has very little likelihood of success.

The subpoena power of a grand jury is not to be limited by questions of propriety, forecasts of the investigation's probable result, or doubts of whether any particular individual will be found promptly subject to an accusation of a crime.<sup>21</sup> The results of the investigation or the identification of particular persons subject to indictment are normally "developed at the conclusion of the grand jury's labors, not at the beginning."<sup>22</sup> A federal grand jury may investigate any federal crime committed within the district in which it is sitting.<sup>23</sup> The grand jury may investigate a matter with no defendant or criminal charge specifically in view.<sup>24</sup> It may inquire into a matter already investigated and ignored by another grand jury<sup>25</sup> and may even take action adverse to that of a previous grand jury. For example, the second grand jury can return indictments against persons whom the first grand jury refused to indict. In *United States v. Steel*,<sup>26</sup> the court refused to dismiss an indictment on such grounds stating:

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<sup>18</sup> *United States v. Anzelmo*, 319 F. Supp. 1106, 1114-15 (E.D. La. 1970); *United States v. Armour and Company*, 214 F. Supp. 123 (S.D. Cal. 1963).

<sup>19</sup> 144 F.2d 604 (2d Cir. 1944).

<sup>20</sup> *Id.* at 607.

<sup>21</sup> *Blair v. United States*, 250 U.S. 273, 282 (1919).

<sup>22</sup> *Id.*

<sup>23</sup> *Hubner v. Tucker*, 245 F.2d 35 n.6 (9th Cir. 1957).

<sup>24</sup> *United States v. Smyth*, 104 F. Supp. 283, 287, n.1 (N.D. Cal. 1952).

<sup>25</sup> *United States v. Thompson*, 251 U.S. 407 (1920).

<sup>26</sup> 238 F. Supp. 580 (E.D.N.Y. 1965).

In any event, and assuming the first and second grand jury were at complete disagreement, this will be no ground for the dismissal since adverse action by a grand jury does not bar or limit action, including contrary action, by a subsequent grand jury. . . .<sup>27</sup>

The grand jury is under the general jurisdiction of a court in the district in which it is sitting, and the court will exercise supervisory jurisdiction to prevent gross abuses of power. However, it has been held that the court cannot unduly interfere with the activities of the grand jury or government counsel.<sup>28</sup> In *United States v. United States District Court*,<sup>29</sup> the lower court refused to let government attorneys examine documents or transcripts outside the presence of the grand jurors, to summarize or digest the evidence for the benefit of the grand jury, or to permit the grand jury to conduct further investigation (ordering it to either indict or return a no bill). Further, the lower court adjourned the grand jury and denied government counsel's request that it be reconvened and allowed to investigate further. On writ of *mandamus*, the Fourth Circuit ordered the lower court to reconvene the grand jury in order that its investigation be continued, vacated orders limiting the right of government counsel to receive and use evidence before the grand jury, and permitted government counsel both to examine evidence outside the presence of the grand jurors and to summarize and digest such evidence for the benefit of the grand jury.

Generally, abuse of grand jury power is subject to attack only by a defendant after an indictment is returned, by a motion to dismiss. Witnesses appearing before a grand jury have no right to raise objections to the power of the grand jury to investigate. In *Application of Radio Corp. of America*,<sup>30</sup> the court held that an attack upon a grand jury subpoena by an industry member under investigation on the grounds of lack of jurisdiction and *res judicata* was premature, citing the Supreme Court's language in *Blair v. United States*:<sup>31</sup>

[W]itnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is in the ordinary case of no concern of one summoned as a witness whether or not the offense is within the jurisdiction of a court or not. At least, the court and grand jury have

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<sup>27</sup> *Id.* at 583.

<sup>28</sup> *United States v. United States District Court*, 238 F.2d 713 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957).

<sup>29</sup> *Id.*

<sup>30</sup> 13 F.R.D. 167 (S.D.N.Y. 1952).

<sup>31</sup> 250 U.S. 273 (1919).

authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction. . . .<sup>32</sup> If and when a true bill is returned by the Grand Jury wherein the movant is named as a defendant, it may then, of course, interpose such plea in bar as it may be advised.<sup>33</sup>

The general assumption that the subpoena power rests in the grand jury is incorrect. The process by which witnesses are compelled to attend the grand jury investigation is the power of the court's process and not the process of the grand jury nor that of the United States Attorney.<sup>34</sup> If a witness fails to attend, the power as well as the duty to compel the attendance is vested in the court.<sup>35</sup>

Involvement by the courts in the grand jury procedure generally occurs when there is an attempt to enforce compliance with subpoenas served pursuant to the grand jury investigation. The Supreme Court has held that it is proper to prevent abuse of the subpoena only where there is "the indiscriminate summoning of witnesses with no definite objective in view and in a spirit of meddlesome inquiry."<sup>36</sup> In fact, courts have curtailed the grand jury's activities only in cases of the most flagrant abuse of subpoenas.

A significant limitation on the ability of the government to use the grand jury for antitrust investigations was noted in *United States v. Procter & Gamble Co.*,<sup>37</sup> which held that it would be an abuse of grand jury process by the Department of Justice to utilize the grand jury device with the sole intent to elicit evidence for a civil case. Upon remand, the lower court held that the Department of Justice had used the grand jury process for solely civil investigative purposes and had thus misused the process. The court, however, denied any more drastic remedy (*e.g.*, suppression of all evidence obtained from the misuse) other than to permit disclosure of the grand jury transcript. The court noted, however, that "if the Department were to repeat such action now, in the face of the [*Procter & Gamble*] decision of our highest court that the same was illegal, it might well be that a different and more stringent remedy would be considered ap-

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<sup>32</sup> *Id.* at 282-83.

<sup>33</sup> Application of Radio Corp. of America, 13 F.R.D. 167, 170-71 (S.D.N.Y. 1952). *Accord*, *United States v. Girgenti*, 197 F.2d 218 (3d Cir. 1962).

<sup>34</sup> Although, for sake of brevity, a subpoena issued under the authority of the court pursuant to a grand jury investigation will be referred to as a "grand jury subpoena."

<sup>35</sup> *Brown v. United States*, 359 U.S. 41, 48-49 (1959), *overruled on other grounds*, *Harris v. United States*, 382 U.S. 162 (1965).

<sup>36</sup> *Hale v. Henkel*, 201 U.S. 43, 63 (1906). *But see In re Dionisio*, 410 U.S. 1 (1973). The utilization of subpoena will be discussed in detail in the next section.

<sup>37</sup> 356 U.S. 677, 683 (1958).



propriate."<sup>38</sup> The effect of this is to require the government, at such time as it decides that it will no longer be proceeding criminally, to terminate the grand jury investigation.<sup>39</sup> It is also improper to utilize the grand jury for the purpose of obtaining and gathering evidence for preparing an already existing indictment for trial.<sup>40</sup> In a related point, it has been held to be an abuse of the grand jury process where the subpoenas were issued by government investigators with no intent to utilize the evidence to conduct a grand jury investigation. The grand jury and not the Department of Justice has the exclusive role as the agency of compulsory disclosure.<sup>41</sup>

### The Power of Compulsion — The Subpoena

As was noted earlier, technically the subpoena power is invested in the court, not the grand jury. The subpoena is issued by the Clerk of the court. Essentially, the Clerk issues the subpoena in blank, signed by the Clerk and imprinted with the seal of the court. Government counsel completes the subpoena and causes it to be served, without requesting the permission of the court. In some districts the Clerk requires that the subpoena be filled out before he will sign it and affix the seal of the court. As a practical matter however, there is little supervision of the subpoena process by the court until some legal steps are taken by the party served with the grand jury subpoena.

Although the subpoena is issued by the court, there has been some suggestion that the grand jury on whose behalf it is issued must be in existence. In the *United States v. Polizzi*,<sup>42</sup> for example, the court held that it is implicit in the rule [Fed. R. Crim. P. 17(a)] that the court can issue a subpoena only if it has before it some proceedings to which the witness is being summoned. However, there are decisions reaching a contrary conclusion.<sup>43</sup>

The service of the subpoena is governed by Fed. R. Crim. P. 17(d) which provides that "[a] subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age . . . ." While there appears to be no prohibition against the service of a subpoena by a government

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<sup>38</sup> *United States v. Procter & Gamble*, 187 F. Supp. 55, 64 (D.N.J. 1960).

<sup>39</sup> *United States v. Pennsalt Chemical Co.*, 260 F. Supp. 171 (E.D. Pa. 1966). An important indicia of possible abuse, necessary to permit a defendant to embark upon the discovery to establish that abuse occurred, would be the fact that a grand jury investigation terminated without the return of an indictment but with the subsequent filing of a civil case by the government in regard to the subject matter of the grand jury investigation.

<sup>40</sup> *United States v. Dardi*, 330 F.2d 316, 336 (2d Cir.), cert. denied, 379 U.S. 845 (1964).

<sup>41</sup> *United States v. O'Connor*, 118 F. Supp. 248, 250-51 (D. Mass. 1953); *In re Pacific Telephone & Telegraph Co.*, 38 F.2d 833, 836 (N.D. Cal. 1930), rev'd on other grounds, 450 F.2d 880 (1971).

<sup>42</sup> 323 F. Supp. 222, 226 (C.D. Cal. 1971).

<sup>43</sup> *United States v. Culver*, 224 F. Supp. 419, 432 (D. Md. 1963); *United States v. Morton Salt Co.*, 216 F. Supp. 250 (D. Minn. 1962), aff'd, 382 U.S. 44 (1963).

attorney,<sup>44</sup> the usual practice is for service to be made by a marshal, and the local rules of some districts require that service be made only by a marshal or his deputy. Since 17(d) requires service of the subpoena by "delivering a copy thereof to the person named," personal service is required.<sup>45</sup>

A grand jury subpoena can be served anywhere in the United States pursuant to Fed. R. Crim. P. 17(e) (1),<sup>46</sup> but not to citizens of the United States residing in foreign countries.<sup>47</sup> Aliens residing outside the United States are not subject to subpoena power of the grand jury nor of the United States district courts generally.<sup>48</sup> Corporations, of course, are subject to the grand jury subpoena *duces tecum*. Foreign firms which are subject to the jurisdiction of the court — doing business in one of the States of the United States — can be ordered to produce documents in their custody which are located abroad.<sup>49</sup> Domestic or foreign corporations subject to civil liability or loss of business abroad, by virtue of the subpoena of their records which are located abroad, will not ordinarily be excused from compliance,<sup>50</sup> but the courts will generally not require a subpoenaed party to violate foreign criminal laws.<sup>51</sup>

Subpoenas *duces tecum* usually engender the greatest amount of legal controversy in the courts. The scope of such a subpoena, its relevance and reasonableness, and the thoughtfulness of its preparation, may vary significantly. Although the Washington headquarters of the Antitrust Division exercises fairly tight supervision over most of the activities of its sections and field offices, it has not chosen to exercise any significant supervision over the content of grand jury subpoenas prepared by staff attorneys. In contrast, the Antitrust division's subpoenas *duces tecum* in civil investigations,<sup>52</sup> which must be approved by the Attorney General or by the Assistant Attorney General, are closely reviewed and accordingly such subpoenas are more uniform throughout the division and are generally more tightly drawn. Supervision of the grand jury subpoena, on the other hand, stops at the Chief of the particular section or field office conducting

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<sup>44</sup> See 8 J. MOORE, *supra* note 13, ¶ 17.04.

<sup>45</sup> *Id.*

<sup>46</sup> United States v. Green, 305 F. Supp. 125, 128 (S.D.N.Y. 1969).

<sup>47</sup> United States v. Thompson, 319 F.2d 665, 670 (2d Cir. 1963); *In re Stern*, 235 F. Supp. 680 (S.D.N.Y. 1964).

<sup>48</sup> United States v. Haim, 218 F. Supp. 922, 926 (S.D.N.Y. 1963).

<sup>49</sup> *In re Investigation of World Arrangements ex rel. Prod., Transp., Ref., and Distrib. of Petroleum*, 13 F.R.D. 280 (D.D.C. 1952).

<sup>50</sup> United States v. First Nat'l Bank, 396 F.2d 897, 901 (2d Cir. 1968).

<sup>51</sup> United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968); Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962).

<sup>52</sup> Civil Investigative Demands issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§1311-14 (1973).

the grand jury investigation and accordingly, there is a great variance in the size, scope and quality of subpoena contents. Thus, if there is any area of antitrust practice subject to the foibles and whims of particular attorneys or staffs, it will exist in the area of drafting grand jury subpoenas.

To the corporation receiving a grand jury subpoena *duces tecum*, it may appear that the government's demands are deliberately burdensome and unreasonable. This is not, however, generally the case. The problem is that the government attorney drafting the subpoena is not familiar with the filing systems, practices and procedures, or the reporting requirements of a particular corporation or industry. Further, there is a natural tendency, lacking precise knowledge of the corporation's practice, to close any possible loopholes with a broad subpoena. Therefore, counsel for a company under investigation should not hesitate to discuss with the government attorneys problems inherent in compliance with the subpoena as drafted. Most government attorneys probably prepare the subpoenas anticipating that counsel for the corporation will point out any major problems in compliance with the subpoena. Reasonable accommodations can frequently be achieved when problems of compliance are discussed with the investigating staff. The corporate counsel certainly should attempt to resolve any problems in this informal manner before filing a motion to quash or limit the subpoena, as the courts have shown little patience with such premature motions.<sup>53</sup>

Return of documents under a subpoena *duces tecum* is generally made before the grand jury, however, this practice varies from investigating staff to investigating staff. Some staffs insist upon a return only before a sitting grand jury, while others will permit, by agreement between counsel for the subpoenaed party and the government, to accept return of documents by mail. A responsible corporate official, knowledgeable as to the file search, must testify before the grand jury either at the time of the documents' actual submission or sometime after the corporation represents that its compliance with the subpoena *duces tecum* is complete. At least one district court has held that the corporation has a duty to provide a representative able to respond to questions regarding the completeness of compliance and the methods of search conducted. A messenger would not be considered sufficient.<sup>54</sup> Generally, a witness appearing on behalf of a corporation which is responding to a subpoena *duces tecum* can expect to be examined, paragraph by paragraph, on the means of compliance, the documents submitted thereto and the scope of the search for the documents.

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<sup>53</sup> These observations are based on the author's personal experience.

<sup>54</sup> *In re Chilcote Co.*, 9 F.R.D. 571, 573 (N.D. Ohio 1949).

The life of the subpoena would appear to terminate upon expiration of the grand jury's term or upon its discharge by the court. After that time, a witness cannot be compelled to give testimony or produce documents since no grand jury exists before which such testimony may be taken or evidence presented.<sup>55</sup> This is consistent with the rule that the court cannot attempt to enforce a subpoena by confining a witness beyond the life of the grand jury<sup>56</sup> because once a grand jury is discharged, a contemptuous witness has no further opportunity to purge himself of the civil contempt.

A discussion of the practical and legal problems of resisting or modifying subpoenas *duces tecum* by motion is beyond the scope of this article. That subject, by itself, would entail a fairly extensive discussion. Suffice to say that conflicts over a subpoena *duces tecum* generally arise regarding the time allowed for compliance, its broad and sweeping nature, its materiality to the investigation being conducted, the period of time covered, the definiteness of the descriptions of the documents demanded, its burdensomeness and its attempts to secure privileged communications.<sup>57</sup>

Frequently, copies of documents are submitted in response to a grand jury subpoena *duces tecum*, in lieu of the originals. This has rarely been contested by the government staff where copies have been legible. However, there have been recent cases where the government attorneys insisted upon seeing the originals to determine whether there had been writing or notations on the reverse side of the originals and whether everything that appeared on the documents also appeared on the copies. For example, some photostatic copiers will not pick up notations in red ink or pencil, nor will erasures or other alterations of documents necessarily be discernible on the copies. Also, the staffs frequently feel that there will be less chance of evidentiary problems arising at a later date if the government is in possession of the originals. Should the government so insist, recent case law will support a demand for the originals.<sup>58</sup> One court resolved this issue by reference to Fed. R. Crim. P. 17(c) stating that:

The Rule says: "A subpoena may command a person to whom it is directed to produce the books, papers, documents or other

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<sup>55</sup> *In re* Grand Jury Investigation (General Motors), 5 TRADE REG. REP. (1960 Trade Cas.) ¶ 69, 796 at 77, 133 (S.D.N.Y. Aug. 22, 1960).

<sup>56</sup> *Shillitani v. United States*, 384 U.S. 364, 371 (1966).

<sup>57</sup> *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946); *Brown v. United States*, 276 U.S. 134 (1928); *Hale v. Henkel*, 201 U.S. 43 (1906). The basic principles are generally set forth in these Supreme Court cases.

<sup>58</sup> *In re* Grand Jury Investigation, 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73, 826, at 91, 483 (S.D. Ohio Jan. 28, 1972).

objects designated therein." The Rule does not say "copies"; it says "*the* books, papers, documents" and so forth. We think this language contemplates originals not copies.<sup>59</sup>

Furthermore, it would appear that if a document called for by the subpoena is relevant in part, then the entire document must be produced. A subpoenaed party cannot require "a line-by-line justification for the production of a generally irrelevant document."<sup>60</sup>

### Handling Grand Jury Documents

The power to impound subpoenaed documents is inherent in the court as an institution of law enforcement.<sup>61</sup> At the inception of the grand jury investigation, the Antitrust Division routinely obtains, *ex parte*, an impounding order from the court, allowing the government attorneys to remove subpoenaed documents from the physical presence of the courthouse and to retain custody of said documents to study, analyze and summarize in aid of the grand jury investigation. The removal of the documents to the offices of the investigating staff is permitted, even where it is outside the district in which the grand jury is sitting,<sup>62</sup> for the above purposes.<sup>63</sup> The party producing the documents should be permitted, upon request to the investigating staff, to inspect his own records, and the impounding order generally so provides.

A practical reason for obtaining an impounding order, especially in districts where there has been little activity in antitrust grand jury investigations, is to assure that the court is aware that the government attorneys are removing the documents from the grand jury and, where applicable, from the district where the grand jury is sitting. This procedure has been used to obviate the possibility of surprise (and resultant hostility), especially after the experience of the government staff related in *United States v. United States District Court*.<sup>64</sup>

The term of the impounding orders varies in practice. Originally, most of them were for the life of the grand jury then conducting the investigation. Recently, however, the practice has been to

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<sup>59</sup> *Id.* at 91,484.

<sup>60</sup> *In re Grand Jury Investigation (General Motors Corp.)*, 5 TRADE REG. REP. (1960 Trade Cas.) ¶ 69, 729, at 76, 845 (S.D.N.Y. May 20, 1960).

<sup>61</sup> *United States v. Ponder*, 238 F.2d 825, 827 (4th Cir. 1956).

<sup>62</sup> This is not unusual because the field offices of the Antitrust Division encompass territories that span many districts. Sections of the Antitrust Division in Washington investigate nationwide. The prevailing practice is to have government counsel retain custody of the documents at their home office location.

<sup>63</sup> *United States v. United States District Court*, 238 F.2d 713 (4th Cir. 1956); *In re Petroleum Industry Investigation*, 152 F. Supp. 646 (E.D. Va. 1957). See *In re Grand Jury Proceedings (General Dynamics Corp.)*, 5 TRADE REG. REP. (1961 Trade Cas.) ¶ 70,027, at 78,091 (Mar. 20, 1961).

<sup>64</sup> 238 F.2d 713, 815-16 (4th Cir. 1956).

expand the term of the impounding order to include any successive grand jury or related legal proceeding arising out of that grand jury investigation.

It should be noted that documents, records or papers produced in obedience to a subpoena *duces tecum* remain the property of the person who produced them and must be returned to him when they have served the purpose for which they were summoned.<sup>65</sup> It would seem, however, that copies of documents properly subpoenaed before a grand jury may be retained by the government.<sup>66</sup> In a related situation, the government was required to return the originals of documents, submitted by the defendants to the grand jury, after the criminal proceedings against them had been terminated but while the civil proceedings were still pending. It was held that since the original documents are the property of the defendants, the government should only retain the copies and return the originals with the understanding that the copies will be used in the civil action with the same force and effect as the originals.<sup>67</sup>

### Examination of Witnesses

Government attorneys interview witnesses prior to their examination before the grand jury when the prospective witness: (1) had been a complainant, (2) knew of the investigation and had voluntarily come forward with information, (3) had been interviewed by the government attorneys during the preliminary investigation, or (4) came forward (usually with his attorney) seeking immunity from prosecution in return for testifying before the grand jury as to what he knew.<sup>68</sup>

It does not appear to be improper for government attorneys to meet with a witness immediately prior to his grand jury appearance provided the meeting is voluntary on the part of the prospective witness and he is not coerced or caused to change his testimony as a result of the meeting.<sup>69</sup> However, the subpoena cannot be used solely to allow the government attorney to conduct his own inquisition in lieu of testimony before the grand jury.<sup>70</sup>

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<sup>65</sup> Application of Bendix Aviation Corp., 58 F. Supp. 953, 954 (S.D.N.Y. 1945).

<sup>66</sup> Maryland and Virginia Milk Producers Ass'n v. United States, 250 F.2d 425 (D.C. Cir. 1957); *In re Petroleum Industry Investigation*, 152 F. Supp. 646 (E.D. Va. 1957).

<sup>67</sup> United States v. General Electric Co., 211 F. Supp. 641, 643 (E.D. Pa. 1962). If the government subpoenaed and received documents by the grand jury process after it had made a decision that it would not proceed criminally, then this would be an abuse of the grand jury process. See United States v. Procter Gamble Co., 356 U.S. 677 (1958).

<sup>68</sup> See discussion of immunity in text accompanying notes 95-97 *infra*.

<sup>69</sup> United States v. Johns-Manville Corp., 213 F. Supp. 65, 72-73 (E.D. Pa. 1962). Although the court did state that it did not approve the practice of having witnesses report to the office of the government attorneys even assuming that the defendant had standing to object to a misuse of the subpoena power, a valid objection must be based on prejudice to his cause.

<sup>70</sup> Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954).

The selection of grand jury witnesses (which in most cases means immunity from prosecution) presents difficult problems for the government staff, particularly at the inception of the grand jury investigation. The government has a legitimate concern that, before all the facts are known, it may inadvertently immunize a person who is later found deserving of indictment. Accordingly, lower echelon personnel will be called first, and later, higher corporate officials will be selectively subpoenaed. As noted previously, many potential witnesses attempt to induce the government to call them before the grand jury thus insuring their immunity from prosecution.

The quality of the witness' examination before the grand jury varies depending upon the skill of the government attorney and his willingness to prepare fully for the examination.<sup>71</sup> Generally, the government attorneys seek: (1) to obtain all the knowledge that the witness has bearing on the investigation, (2) to evaluate the truthfulness and credibility of the witness, and (3) to foreclose any possibility that the witness may surprise the government at a later criminal trial.

Upon the witness' entry to the grand jury room, he is given the oath by the foreman. Where the witness has requested immunity, he is handed an order of the court granting such immunity. This order is generally read into the grand jury record. If the witness has any questions to ask regarding immunity or other aspects of his impending examination, the government attorneys will usually seek to answer them. The government attorneys should also advise the witness of his obligation to tell the truth.

The witness is generally examined first by the government attorney having the primary responsibility for that examination. Other members of the government staff will then question the witness on matters which were insufficiently covered (or not covered at all), questions which received ambiguous responses, and new matters brought out in the witness' answers. The foreman and the other members of the grand jury are also given an opportunity to question the witness. The general procedure is for the grand jurors to question the witness after the government attorneys have completed their questioning, unless a grand juror has a particularly urgent question to ask during the course of the examination. This order of questioning is preferable because the grand jurors have not engaged in the witness preparation and may better formulate their questions after observing the witness and his answers. Frequently, a witness is unprepared for the number of people that he must face in a grand jury room and the questions each may ask. Thus, the witness may feel intimi-

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<sup>71</sup> The Antitrust Division has its share of attorneys who believe skills can substitute for thorough preparation — a belief which the author does not share.

dated by virtue of the procedure itself rather than as a result of any abuse or improper questioning. An attorney representing a witness should be aware of this and of the fact that a witness' initial impression or version of what occurred in the grand jury room may be highly colored by his experience. Accordingly, he may convey the impression of being put-upon when, in fact, he was treated with propriety. Certainly, no witness can really enjoy being pressed for his full knowledge on a variety of matters and having his credibility tested. Many attorneys representing witnesses are not aware of these circumstances and frequently jump to the erroneous conclusion that their client has been abused or otherwise improperly examined before the grand jury.

The most common faults of questioning government attorneys seem to be: (1) the failure to develop the who, what, where, and when of events about which the witness testifies, (2) the failure to follow up on new information or leads obtained during the responses, (3) the failure to listen to the witness' answer, (4) the interruption of a witness prior to the completion of his answer, (5) the failure to elicit testimony which may qualify any "damaging" admissions or conspiratorial testimony, (6) the failure to examine witnesses as to possible bias or other motives for giving incriminating testimony, and (7) the persistent phrasing of questions so that the government attorney does the testifying and the witness merely answers affirmatively or negatively. Frequently an uncooperative or evasive witness must ultimately be subjected to leading and pressing questions, but a witness should always first be examined in a manner which will permit the witness to testify to events as he recalls, interprets, and understands them. A "yes" or "no" answer to a long rambling leading question is most often worthless since there is no assurance that the witness understood the question, was testifying of his own knowledge, or was answering all rather than some parts of the question. Finally, and perhaps most important, when the government attorney does all the testifying while the witness answers merely "yes" or "no," the government really cannot determine how that witness would testify affirmatively in a trial setting.<sup>72</sup>

It is a bad practice to interrupt a witness even when he goes beyond the scope of the question because his additional testimony may contribute valuable information to the course of the investigation. However, where a witness consistently rambles well beyond the scope of the questioning with irrelevant comments, confused answers and excessive verbiage, the witness should be requested to limit his answers and listen to the questions. Actually, the witness has no right to testify to matters beyond the scope of the questions asked of him.

In recent years, the Department of Justice has more closely

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<sup>72</sup> These observations are based on the author's personal experience.



scrutinized the testimony of witnesses whose forgetfulness strains credulity, for possible obstructions of justice. The Department has been encouraged in this effort by the result in *United States v. Alo*,<sup>73</sup> where a witness pleaded loss of memory 134 times in one half hour session of an SEC investigative hearing while other witnesses clearly recalled details of meetings which the forgetful witness attended.<sup>74</sup> The forgetful witness was indicted for obstruction of justice and convicted. On appeal, it was held that the blatantly evasive witness obstructs justice by erecting the screen of feigned forgetfulness as surely as one who burns files or induces a potential witness to absent himself.<sup>75</sup>

The question of what constitutes abuse of a grand jury witness in the course of an examination is a most difficult one. The government attorneys are responsible for determining the true facts in order to fairly and effectively enforce the antitrust laws. This necessarily requires firm and, on occasion, vigorous questioning, but it should always be done in a courteous manner. Many witnesses, consciously or subconsciously, have been reluctant to cooperate fully with the grand jury either due to fear of economic reprisals by their employers or others in the industry, or out of a desire to avoid involvement later as a trial witness, or simply to protect their own companies or associates. These witnesses will tend to interpret broad questions very narrowly, and the examining attorney must carefully prepare his questions so that the witness is not given the opportunity to withhold information merely because the precise question was not asked. This can be a trying and difficult procedure for both the witness and the examining attorney. I have found that in most instances where a witness is determined to be uncooperative there will be a little dramatic breakthrough by virtue of the questioning skill of the examining attorney.

Obvious areas of abuse concern questions which: (1) attempt to violate the witness' attorney-client privilege (although insuring that a witness has been advised of his rights and responsibilities by his counsel would not be abuse),<sup>76</sup> (2) misrepresent to a witness that testimony, documents or facts exist which really do not exist (or which the government attorney does not know exist), (3) mischaracterize the contents of documents, or (4) are demeaning or contemptuous of a witness.

Determining whether a witness has been browbeaten or intimidated by threats of prosecution for perjury is extremely difficult.

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<sup>73</sup> 439 F.2d 751 (2d Cir. 1971), *cert. denied*, 404 U.S. 850 (1971).

<sup>74</sup> *Id.* at 753.

<sup>75</sup> *Id.* at 754.

<sup>76</sup> *United States v. E. H. Koester Bakery Co.*, 334 F. Supp. 377, 382-83 (D. Md. 1971).

Bullying a witness by questioning him so forcefully that the desired answers are apparent is abusive. However, this type of abuse is not easy to discern because it depends largely upon the examiner's demeanor and tone of voice — things which a transcript will not reveal. Such conduct by the government attorney, however, hinders rather than helps in the investigation. Grand juries at times become hostile when the government attorney has bullied the witness or has been discourteous. Grand jurors are sensitive to fair play and proper decorum, and few will abide by unreasonable conduct on the part of the government attorneys. Generally, they will make their views known to either the attorneys or to the court. When this happens the government sits up and takes notice because the hostility of the grand jury panel is the last thing it desires.

Perhaps the most heated controversy between the private bar and the government concerns the question of what constitutes abuse with regard to a witness being made aware, during his testimony, of his obligations to tell the truth or, conversely, the dangers of committing perjury. Generally, such admonitions are given to all witnesses at the inception of their testimony. After each recess, the grand jury foreman reminds the witness that he is still under oath. Unless the witness is extremely uncooperative, gives testimony which strains credulity or appears to be obviously lying no other warning is generally given.

Of course, the government attorney's evaluation that a witness may be lying is highly subjective, and, despite the outward appearance of the testimony, it is always possible that the witness is telling the truth. Assuming that the government attorney is not a mind reader, he must, when he feels that a witness is not testifying truthfully, firmly advise that witness of his obligation to tell the truth and make sure the witness is aware of the provisions of the perjury statute. This becomes abusive when the examining attorney threatens to send the witness to jail or states that the government will be "out to get" him if he doesn't change his testimony. However, a witness should be advised where his testimony is so questionable that it deserves careful scrutiny by the government.

Undoubtedly, there will always be some inherent conflict between a private attorney's sense of fair play towards his client-witness and the grand jury's duty to investigate and inquire, a duty which is "not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been committed. . . ." <sup>77</sup> More recently, in *In re Grand Jury Investigation of Giancana*,<sup>78</sup> the Circuit Court observed that the grand

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<sup>77</sup> *Carroll v. United States*, 16 F.2d 951, 953 (2d Cir.), cert. denied, 273 U.S. 763 (1927).

<sup>78</sup> 352 F.2d 921 (7th Cir.), cert. denied, 382 U.S. 959 (1965).

jury "may, by various avenues of interrogation, exercise its traditional functions in such a way as to elicit information about possible criminal violations. In seeking to establish the facts, a grand jury, framing its questions to a witness, may adapt its form of approach to that most strategically suited to elicit the facts. Its form may be direct or indirect. . . ." <sup>79</sup>

Notwithstanding the difficulties of establishing abuse, a witness would have very little standing to challenge the grand jury process. Usually, the abuse becomes evident after the return of an indictment based upon the motion of a defendant. The burden upon a defendant moving to set aside an indictment due to improper conduct by the government attorneys before the grand jury is a heavy one.<sup>80</sup> On several occasions, courts have inspected transcripts *in camera* in order to ascertain whether evidence of witness abuse exists.<sup>81</sup> The difficulty of demonstrating that the conduct is abusive or that the defendant is prejudiced thereby was evident in *Beck v. Washington*,<sup>82</sup> where a witness came back for a voluntary reappearance before the grand jury two days before the indictment was to be returned and changed his story. The Court recounted that:

The prosecutor attacked the witness' changed story as incredible and warned him that he was under oath, that he might be prosecuted for perjury, and that there was no occasion for him to go to jail for petitioner. The record indicates that the prosecutor became incensed over the witness' new story; and though some of his threats were out of bounds, it appears that they had no affect upon the witness whatsoever for he stuck to his story. We can find no irregularity of constitutional proportions, and we therefore reject this contention.<sup>83</sup>

A more outstanding example of the heavy burden imposed for showing abuse, or more accurately, for capitalizing upon the abuse of the government attorneys, was apparent in *United States v. Bruzgo*.<sup>84</sup> There the defendant moved to dismiss the indictment because the

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<sup>79</sup> *Id.* at 924.

<sup>80</sup> 8 J. MOORE, *supra* note 13, ¶ 6.04. *See, e.g.*, *United States v. Tucker*, 161 F.Supp. 289, 291 (D.C. Penn. 1958) (held, defendant did not meet the burden of setting aside an indictment where it was contended by the defendant that he was forced by military order from his superiors to testify against himself).

<sup>81</sup> *United States v. Pennsalt Chem. Corp.*, 260 F. Supp. 171 (D.C. Penn. 1966); *Washington v. American Pipe and Constr. Co.*, 41 F.R.D. 59 (D.C. Cal. 1966); *Autrey v. Williams and Dunlap*, 210 F. Supp. 491 (D.C. La. 1962). The courts in these cases did permit *in camera* inspection of grand jury records but stressed the necessity of a balancing test which weighed the need for evidence against the need for grand jury secrecy.

<sup>82</sup> 369 U.S. 541 (1962).

<sup>83</sup> *Id.* at 555.

<sup>84</sup> 373 F.2d 383 (3rd Cir. 1967).

prosecuting attorney threatened a witness with loss of citizenship, imprisonment, and also referred to the witness as a "thief" and "racketeer." After all this, the Court stated:

On this issue the case comes down to the point that the prosecutors improperly made threats or used abusive language toward a witness connected with defendant in his business and thereby influenced the grand jurors with such a bias toward the defendant that he was not afforded his constitutional right to be indicted by an "unbiased" grand jury.

Without considering the full sweep of the term "unbiased" we turn to an evaluation of the evidence on this question. The grand jurors knew of Miss Williams' business connection with defendant. They also knew that she successfully invoked the Fifth Amendment before them. They had evidence which it is not denied was sufficient to support an indictment. In these premises the threats could hardly have had independent material significance in the jurors' minds when they considered whether they wanted to indict defendant. Their "hissing" does not nullify their action in view of what they had properly before them. . . .<sup>85</sup>

### Consulting With Counsel During Grand Jury Questioning

The extent, if any, that a witness will be permitted to leave the grand jury room to consult with his attorney is another question which depends upon the attitude of the investigating attorneys. While no federal case has ruled upon a witness' absolute right to interrupt the grand jury session to consult with his attorney, several opinions imply that such a right exists provided it is not abused; for example, where it is used as a tactic to delay and confuse the grand jury proceeding.<sup>86</sup> At least one state court has ruled that the witness does have a right to consult with his attorney and defined the scope of such a right. In *People v. Ianniello*,<sup>87</sup> the Court held that the witness has a legal right to consult with counsel regarding (1) his privilege against self-incrimination, (2) questions which he feels have no bearing on the subject of the investigation, and (3) questions which may involve a testimonial privilege enjoyed by the witness. The Court noted that the danger of stalling tactics can be reduced because the

<sup>85</sup> *Id.* at 386. See also *Beatrice Foods v. United States*, 312 F.2d 29 (8th Cir. 1963); *United States v. Toledo Milk Distributors Ass'n*, 5 TRADE REG. REP. (1954 Trade Cas.) ¶ 67,815, at 69,649 (N.D. Ohio June 23, 1954); 8 J. MOORE, *supra* note 13, ¶ 6.04.

<sup>86</sup> See *In re Kennedy Tierney*, 465 F.2d 806, 810-11 (5th Cir. 1972); *United States v. Leighton*, 265 F. Supp. 27, 38 (S.D.N.Y. 1967), *cert. denied*, 390 U.S. 1025 (1968); *cf. United States v. Levinson*, 405 F.2d 971, 980 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969).

<sup>87</sup> 21 N.Y. 2d 418, 235 N.E.2d 439, 288 N.Y.S. 2d 462, *cert. denied*, 393 U.S. 827 (1968).

supervising judge can compel a witness, who is raising objections not in good faith, to desist from this course of action under sanction of contempt proceedings.

It should be noted that the strict secrecy rules regarding matters that transpire before the grand jury do not apply to the witness.<sup>88</sup> The government cannot impose upon a witness, directly or indirectly, any obligation to keep his testimony secret merely because it was given to the grand jury.<sup>89</sup>

### Witness Immunity

Prior to the Organized Crime Control Act of 1970,<sup>90</sup> immunity questions in antitrust grand jury proceedings were fairly simple. Whenever a witness testified substantively before any antitrust grand jury immunity attached automatically with regard to "any transaction, matter, or thing" concerning which the witness may have testified. This "transactional immunity" provided a virtual umbrella of protection to the witness in regard to the subject of that grand jury investigation regardless of the manner or matter of the witness' testimony.<sup>91</sup>

Under the current immunity law, immunity does not attach automatically but must be sought by petition of the government and granted by order of the court. It is not the blanket immunity that previously existed, but a so-called "use" immunity by which

no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . . .<sup>92</sup>

The constitutionality of the immunity provisions of the 1970 Act was upheld in *Kastigar v. United States*.<sup>93</sup>

Use immunity is much narrower than transactional immunity because use immunity does not bar the prosecution of the witness but only precludes his testimony from being used against him.<sup>94</sup> Under

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<sup>88</sup> FED. R. CRIM. P. 6(e).

<sup>89</sup> *In re* Proceedings Before the Grand Jury Summoned October 12, 1970, 321 F. Supp. 238 (N.D. Ohio 1970). For example, cautioning the witness to report back to the grand jury if he was interrogated by anyone regarding the questions asked was held to improperly impose some obligation of secrecy upon the witness. *Id.* at 240-41.

<sup>90</sup> 18 U.S.C. §6001, *et seq.* (1970), (hereinafter referred to as the "1970 Act").

<sup>91</sup> Act of Feb. 25, 1903, ch. 755, §61, 32 Stat. 904; Act of June 30, 1906, ch. 3920, 134 Stat. 798.

<sup>92</sup> 18 U.S.C. §6002 (1970).

<sup>93</sup> 406 U.S. 441 (1972).

<sup>94</sup> 18 U.S.C. §6002 (1970).

the old transactional immunity statute, the witness obtained blanket immunity from prosecution based on the transactions inquired into.<sup>95</sup> Under the old transactional immunity statute, immunity automatically attached after one substantive examination. No particular incentive to give details of the transaction which might be useful to the investigation was provided because immunity attached whether the witness was evasive or responsive. There is, however, a stronger incentive under the new use immunity statute for a witness to disclose as many of the details as possible and thereby preclude, for all practical purposes, the government from using that transaction against him because of the detail with which he testified. An evasive witness who reveals few specifics will be in a poor position, if later indicted, to argue that such testimony was or will be used against him in order to obtain a conviction.

The other major change under the new immunity statute is that a witness will not obtain immunity unless he requests it by exercising his privilege against self incrimination.<sup>96</sup> The government will generally inquire of counsel for the witness, well in advance of the date of his testimony, whether the witness intends to seek immunity because the new immunity procedure requires the staff to obtain several layers of authorization from Washington and the cooperation of the United States Attorney as a statutory prerequisite to obtaining an order of immunity from the court.<sup>97</sup> This usually requires a minimum of at least two weeks. An alternative procedure is for the investigating staff to assume that the witness will request immunity and, without inquiry of the witness or his counsel, seek authorization to obtain an immunity order in the event the witness raises his fifth amendment rights.

### Authorization of Indictment Recommendation

One of the greatest protections a prospective defendant has against arbitrary or capricious criminal accusations is the Antitrust Division's scrutinization, evaluation, review, and authorization of its recommendations to the grand jury with regard to indictments. Ironically, this procedure is probably the least understood or the least appreciated by private counsel who represent potential defendants.

The Antitrust Division investigating staff has no authority or power to make a recommendation to the grand jury regarding indictment without authorization from the Attorney General and the Assistant Attorney General in charge of the Antitrust Division.<sup>98</sup>

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<sup>95</sup> See note 91 *supra*.

<sup>96</sup> 18 U.S.C. §6002 (1970).

<sup>97</sup> 18 U.S.C. §§6002-03 (1970).

<sup>98</sup> Attorney General William Saxbe recently announced that the Assistant Attorney General will now have authority to recommend criminal indictments without prior approval of the Attorney General.

Authorization to recommend indictment to the grand jury is carefully considered and is not given without full justification. Accordingly, after analysis of the documents and testimony, the staff prepares a "memorandum of evidence" presenting all jurisdictional and conspiratorial evidence which supports the government's case. Any defenses or facts in mitigation are required to be set forth. The following affidavit of a Section Chief in the Antitrust Division, set forth in the Court's opinion in *United States v. Pennsalt Chemicals Corp.*,<sup>99</sup> demonstrates the built-in protections of the review procedure:

Sometimes the several members of the staff do not agree whether to recommend an indictment, or a civil action only or both actions. Sometimes, for example, some members of the staff may believe that there is evidence beyond a reasonable doubt that the antitrust laws have been violated and that a criminal prosecution is warranted but have serious doubts that they will be able to persuade a petit jury of this. In such instances, they may believe it preferable not to ask for an indictment but to seek to enjoin their legal conduct by an injunction in a civil action instead. Their recommendations are again reviewed by the Section [or Field Office] Chief, then by each of the two assistants to the Assistant Attorney General and finally by the Assistant Attorney General. In some cases the Assistant Attorney General's decision is reviewed by the Attorney General.

At each stage of the review, attorneys are required to examine and point out the possible defenses and weaknesses in the case. Their memoranda analyze in detail their views of the evidence, their conclusion and their opinions. Their doubts are expressed and sharp differences of opinion may exist among the various staff members. These differences may not be resolved until after review by the Assistant Attorney General.<sup>100</sup>

Eventually, the Assistant Attorney General prepares his own recommendations for the Attorney General. If the Attorney General authorizes the recommendation of an indictment to the grand jury, the staff is advised and then meets with the grand jury, summarizes the relevant evidence, entertains any questions or comments which the grand jurors might have and makes available to the grand jury the documentary evidence and the transcripts.

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<sup>99</sup> 260 F. Supp. 171 (E.D. Pa. 1966).

<sup>100</sup> *Id.* at 179.

It should be emphasized that counsel representing a prospective defendant may have several opportunities to convince either the investigating attorneys, or their superiors in Washington, that an indictment of his client is not warranted. This is a difficult task especially where the staff has arrived at a conclusion to recommend indictment. Counsel for a prospective defendant has on occasion successfully made such an argument. Accordingly, if counsel for the prospective defendant feels he can present important factors for the staff's consideration, he should request a meeting with them prior to the formulation of their recommendations and also request a conference with the appropriate Division officials in Washington in the event of an adverse recommendation by the staff prior to any final decision.<sup>101</sup>

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<sup>101</sup> Although the Division does not usually reveal the recommendation of the staff to private counsel, he can assume the worst, if he is invited to a conference in Washington pursuant to his request.